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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 117.

HUNTER A. GIBBES, REPRESENTING HIMSELF AND ALL OTHER DEPOSITORS OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ETC., APPELLANT,

vs.

SIMPSON J. ZIMMERMAN, INDIVIDUALLY AND AS CONSERVATOR OF THE CENTRAL UNION BANK OF SOUTH CAROLINA, ET AL., APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF APPELLANT.

JURISDICTION ON APPEAL FROM STATE SUPREME COURT—UNITED STATES CONSTITUTION—DUE PROCESS—IMPAIRING CONTRACT.

STATEMENT.

This was an action begun on April 11, 1933, by the issuance by the Circuit Judge of a Rule to Show Cause in the Court of Common Pleas for Richland County, South Carolina, by the appellant, Hunter A. Gibbes, a depositor in Central Union Bank of Columbia, South

Carolina, in behalf of himself and all other creditors and depositors of that Bank. R. p. 3, par. 3; p. 7, par. 1. The action is against the Governor of the State and the State Treasurer, representing the State Banking Board and their appointee, Simpson J. Zimmerman, as Conservator of the same bank.

The action by the appellant was for the purpose of having a receiver appointed to take charge of the property and assets of the bank, to enforce and collect the stockholders liability, to restrain all proceedings by creditors and depositors other than in this action, and to have declared null and void the Act of the General Assembly of South Carolina, passed on March 9, 1933 (R. pp. 12-20; p. 3, par. 3; pp. 7-12, pars. 1-16.)

After the commencement by appellant of his action of April 11, 1933, to-wit, on April 12, 1933 (R. p. 2), the Appellees filed a petition in the Supreme Court of South Carolina (R. pp. 2-6) asking that Court to issue its writ of prohibition to restrain and enjoin the Court of Common Pleas of Richland County and the Appellant from further proceedings in the cause begun on April 11, 1933.

The validity under the Constitution of the United States of the Act of the State Legislature of March 9, 1933, was raised in and by the pleadings in both cases (R. p. 5, f. 11; pp. 5-6, par. 11; p. 10, par. 11; p. 11, par. 4 of the first action; pp. 22-3, pars. 3-4; p. 24, par. 8; pp. 24-5, par. 10; p. 26, par. 13 of second action).

The facts on which the first action is predicated (R. pp. 7-12), indeed all the facts, are practically unchallenged.

The Supreme Court on the hearing on the application for the writ of prohibition upheld the validity of the Act of March 9, 1933 (R. pp. 27-35) and granted the writ as prayed for, restraining "all depositors and creditors" * * * from proceeding in any way against the Bank, its officers, stockholders, employees or its assets, except in this action.

There is practically no controversy in the case except as to the validity of the Act of March 9, 1933, as construed by the Supreme Court of South Carolina. In the action begun by appellant to have a Receiver appointed, to have the Act of March 9, 1933, declared null and void, etc., the appellant charged, (p. 8, par. 8) that the bank suspended its regular banking functions at the close of business, March 4, 1933, and since then has refused to pay anything to its depositors, including the appellant, on account of deposits in the bank.

Appellant's statement (p. 9, par. 9) is unchallenged that there is no chance of re-opening or re-organizing the bank and that its property and assets should be liquidated and applied to the payment of its debts to depositors and creditors.

Appellees in their petition for writ of prohibition (pp. 4-5, par. 8) claimed they were investigating but "that it is impossible to tell at this time (April 12, 1933) and prior to the completion of said audit, whether or not the said banks (there was a chain) will be reorganized or liquidated", etc. But it will be conceded that the bank is insolvent and the conservator, one of the appellees, is proceeding to liquidate it under the authority of the Act of March 9, 1933, and certain statutes enacted since said date.

It is also to be noted, as alleged by appellant and undisputed, that the appellee, Zimmerman, on being appointed conservator, proceeded and was proceeding, at the time (April 11th) of the commencement of the action in the Court of Common Pleas for receivership, to receive and pay out deposits on special trust accounts and exercising limited banking functions, thereby incurring expenses against the assets of the bank which should be preserved for depositors.

The appointment of the conservator and his acts in conducting the banking business and using the assets of the bank were and are without any opportunity to appellant or any depositor to have any voice therein. Indeed, this constitutes one of the alleged grounds of the unconstitutionality of the law of March 9, 1933 (R. p. 22, par. 3(a)).

The questions presented for the consideration of this Court are whether or not the Act of the General Assembly of the State of South Carolina of March 9, 1933 (R. pp. 12-16) as construed and interpreted by the Supreme Court of South Carolina in the opinion in the record herein (pp. 27-35), (1) deprives appellant of his property without due process of law; (2) impairs the obligation of his contract.

ARGUMENT.

I. JURISDICTION.

The jurisdiction of this Court is invoked under Sect. 237 of the Judicial Code as amended, U.S.C.A. Title 28, Sect. 344 (a) and (b), upon the grounds that the Act of the General Assembly of South Carolina of March 9, 1933 (R. pp. 12-20), as interpreted by the Supreme Court of that State (R. pp. 27-36):

(a) Deprives appellant of his property without due process;

(b) Impairs the obligation of his contract in violation of the provisions of the Constitution of the United States, Amendment XIV. and Art. I, Sec. 10. The State Supreme Court has passed on these questions adversely to the Federal claim.

Home Ins. Co. v. Dick, 281 U. S. 397, 407, 74 L.Ed. 926, 933.

II. DUE PROCESS.

Assignment of Errors I.

Notice and a reasonable opportunity to be heard are essential to due process, in taking or affecting the property or property rights of any citizen.

Powell v. Alabama (decided Nov. 7, 1932), 77 L.Ed. 78, 89, and citations.

Sterling v. Constantin (decided Dec. 12, 1932), 77 L.Ed. 254, 262, 264, and citations.

Amr. Surety Co. v. Baldwin (decided Nov. 14, 1932), 77 L.Ed. 125, 131, and citations.

Assets of an insolvent bank (or other corporation) are property of its depositors and creditors.

Rice v. City of Columbia, 143 S. C. 516, 539, 141 S. E. 705 (2).
Peurifoy, Receiver, v. Gamble, 145 S. C. 1, 7, 142 S. E. 788 (1).
Citizens Bk. v. Bradley, 136 S. C. 511, 514-15, 134 S. E. 510.
Coriell v. Morris White, Inc., 54 F. (2d, 1-6) 255, 258, 260. (C.C.A., N. Y.)

The Circuit Court of Appeals of New York, in *Coriell v. Morris White, Inc.*, speaking through Judge Manton, says:

> Assets of an insolvent commercial corporation have long been recognized as a trust fund for the payment of its creditors.

The Supreme Court of South Carolina announces the principle well settled in that state in the case of *Rice v. City of Columbia*, thus:

> The necessary, inevitable result of this conclusion is that the very moment a corporation, banking or other, reaches the point of insolvency (presumptively, as a matter of course, to the knowledge of the managing agents of the corporation), certainly in the immediate prospect of dissolution and bankruptcy, its assets become impressed with a solemn trust to be distributed ratably among its creditors, subject, of course, to liens; and the managing agents become the administrators of that trust. This is so manifestly just and right as to appeal instantly and most strongly to the conscience of a chancellor.

In the present case after the appellant had become and was a depositor in the Bank (R. p. 7, par. 1), the Governor and Board of Bank Control (R. p. 9, par. 6) appointed the Appellee, Simpson J. Zimmerman, Conservator of the Bank under the Act of March 9, 1933, without notice to Appellant or any other depositor (R. p. 9, par. 6; p. 24, par. 10). Since his appointment the Conservator has taken charge of the property and assets of the Bank and has proceeded to conduct a limited

banking business, using and endangering the assets and property of the bank and incurring expenses without the approval and against the will of the owners, depositors and creditors (R. p. 8, par. 5; p. 24, par. 10). The appellant and other depositors are enjoined and prohibited in the action from asserting any claims against this Conservator.

In the case of *Sterling v. Constantin*, cited above, this Court, in discussing the exercise by the Governor of Texas of a power under circumstances somewhat similar to that claimed by appellees in the present case, says:

> If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overriden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends (Art. 3, §2) and, so extending, the Court has all the authority appropriate to its exercise.

The operation of these trust accounts, which yielded no income to the bank, by the Conservator required him to maintain a large bookkeeping force and to incur other overhead expenses at the expense of the old depositors. This violates the right of the appellant to share ratably in the assets and deprives him of his property without due process.

III. IMPAIRING THE OBLIGATION OF A CONTRACT.

Assignment of Errors II.

We also claim that under the Constitution and statutory laws of South Carolina a depositor is given as against the stockholders in a banking institution, the right to collect from the stockholders an assessment equal to and in addition to the full face par value of his stock, sometimes called double liability; while, under the Act of Mar. 9, 1933, (R. p. 15, Sect. 4) as interpreted and construed by the Supreme Court of South Carolina, in this case, and as construed and interpreted by the Governor and his Banking Board, the plaintiff and all depositors are prevented from seeking and enforcing this right and any remedy therefor R. p. 9, par. 6; p. 22, par. 3(b), in violation of our rights as guaranteed by the Federal Constitution, Art. I, Sec. 10, Clause 1.

The contract rights of depositors in a Bank when it closes are prescribed by:

1. The Constitution of the State of South Carolina, adopted in 1895 and in force since that time, Art. IX, Sec. 18, as follows:

> Art. 9. Sec. 18. **Liability of Stockholders—In Banks.**—The stockholders of all insolvent corporations shall be individually liable to the creditors thereof only to the extent of the amount remaining due to the corporation upon the stock owned by them: Provided, That stockholders in banks or banking institutions shall be liable to depositors therein in a sum equal in amount to their stock over and above the face value of the same.

2. By the statutory laws, Vol. III, Code of 1932, Sect. 7868:

> **§ 7868. Liability of Stockholders of Insolvent Banks.**—The stockholders of all insolvent banks and banking institutions, whether heretofore or hereafter incorporated under Act of Assembly of this State, either general or special, shall be individu-

> ally liable to the creditors thereof, other than depositors, only to the extent of the amount remaining due to the corporation upon the stock owned by them: *Provided*, That stockholders in all such banks and banking institutions shall be liable to depositors therein in a sum equal in amount to their stock over and above the face value of the same.

This last section was enacted and has been in force since 1905, XXIV Stat. of S. C., p. 889.

The Constitution and the statutes were admittedly in force at the time of and long prior to the formation of the Central Union Bank or its predecessors.

This "liability is contractual in its nature, arising by reason of the purchase (or subscription) of the stock, the subscription being a voluntary act of the purchaser, who makes it in contemplation of all applicable law, understanding that he may be called upon for such contribution."

> *Fischer v. Chisolm*, 159 S. C. 395, 398, 157 S. E. 139 (decided in 1930).

This is but an announcement of the general principle that the law in force at the time of the making is a part of all contracts.

> *Amer. Ins. Union v. Lowry*, 62 F. (2d) 209, 213, (C.C.A., Texas, 1932), and citations.

The only remedy for the recovery of this double liability from the stockholders is through and by a receiver as prescribed by the statutory laws of the State contained in III. Code of 1932, § 7855, sub-sect. (6), as follows:

> (6) *Stockholders' Liability.*—Any receiver appointed to liquidate the assets of any closed State bank shall, under the authority of this section when it is necessary to collect the liability of stockholders, have full power and authority to demand of such stockholders the statutory liability, provided for in section 7868, and upon failure of any stockholder to pay into his hands such liability, he is hereby invested with full power and authority to bring suit,

either individually or collectively, against such stockholder, or stockholders, for the collection of such liability, and all funds received from said assessment by payment, with or without suit, shall be kept as a separate fund to be paid to the depositors solely. Said receiver shall receive as compensation for the collection of the stockholders' liability, two and one half (2½) per cent. and in case same is placed in the hands of the attorney for collection by suit, or otherwise, an additional five per cent. may be paid to the attorney for his services, or so much as the Court may decide the attorney is entitled to.

That this remedy, which was first prescribed by statute in 1929, and has been in force ever since, is exclusive, see

Branchville Motor Co. v. Adden, 158 S. C. 90, 95, 155 S. E. 277 (3). (Decided in 1930).

Pertinent portions of the opinion in this case are:

> Neither the statute, Section 3998, nor the Act of 1929 confers upon the depositor an enforceable right; that is accomplished by the Constitution, to which the legislation adds nothing. Until the Act of 1929 was passed the depositor looked to the inexhaustible fountain of equity jurisprudence for his remedy, which, as we have seen, was a suit in the nature of a creditors' bill in equity. The equitable principles established in England have been here adopted as a part of the common law, and applied to the instance in point upon the ground that, where there is a right, there must be a remedy.
>
> It must be conceded that, where there is an existing established right, and an existing remedy, either statutory or at common law, a new statute, recognizing the right and providing a new remedy, will not be held to have superseded the existing remedy unless:
>
> 1. There is in the new Act an explicit repeal of the old remedy; or
>
> 2. The enforcement of the new remedy necessarily presents a situation incompatible with the continued existence of the old remedy; or
>
> 3. It clearly appears that by the new Act the Legislature intended to take over the entire field of operations, to the necessary exclusion of the old remedy.

In addition to his right to sue on the stockholders' liability the Appellant has the right, upon the refusal of the Bank to pay his deposit on demand, to go into the Courts and sue for his deposit, and if the Bank was insolvent, to share ratably in the unpledged assets of the Bank, to vote at a depositors' meeting for a Receiver to administer the affairs of the Bank under the provisions of the Code of 1932, § 7855, which required that a majority of the depositors nominate a Receiver, and to appeal to an Equity Court on the insolvency of the Bank for the purpose of having a meeting of the depositors called for the purpose of having a Receiver appointed, an orderly liquidation effected and a ratable share of the assets paid to the Appellant.

The Act of March 9, 1933, prohibits the Appellant for a period of eighteen months from enforcing any of these contractual rights and imposes upon him a $5,000.00 fine, or a period of imprisonment if he attempts to enforce these contractual rights. This constitutes an impairment by the State of South Carolina of the obligation of the Appellant's contract with the Bank.

The Act of March 9, 1933, set up and relied on by Appellees in this case, Sec. 4 (R. p. 15), provides among other things:

> And all persons, firms or corporations are hereby prohibited, while the Governor is in control of the banks, banking institutions, * * * , from instituting any legal proceedings of any nature whatever against any bank * * * without first obtaining the written approval of the Governor.

We alleged in our complaint, which is set forth in and as a part of the action by appellees herein and is not disputed (R. p. 9, par. 2): "That the depositors of the bank, under the terms of this Act, are prevented from bringing any action against the bank itself without the approval of the Governor. That the plaintiff herein has asked the Governor for authority to bring action against the bank for the purpose of determining its solvency and for providing for its orderly liqui-

dation but said request has to date been refused by the Governor of the State."

The Supreme Court of the State, in its decision (R. pp. 21-35) has upheld the Act in its full force and validity and has granted and issued its writ of prohibition preventing the appellant herein and other depositors from enforcing their rights against the stockholders.

We submit:

A State cannot dissolve a contract of a depositor with a bank.

First National Bk. of San Jose v. California, 262 U. S. 366, 370, 67 L.Ed. 1030, 1035.

Part of the obligation of a contract is the means of enforcement.

U.S.C.A., Const., Part 2, Art. I, §10, pp. 42-3, and cases.

Substantial remedy must be given.

U.S.C.A., Const., Part 2, Art. I, §10, Note 503, 505, 507, pp. 200-202.

A State can change the remedy provided it does not deny or so embarrass with conditions as to seriously impair value.

U.S.C.A., Const., Part 2, Art. I, §10, Note 502-3-4-5-6, pp. 199-200.
Penniman's Case, 103 U. S. 720, 26 L.Ed. 602.
Von Hoffman v. Quincey, 4 Wall. 553, 18 L.Ed. 403.
Memphis, etc. R. Co. v. Tenn., 101 U. S. 339, 25 L.Ed. 960.

The degree of impairment is immaterial.

U.S.C.A., Const., Part 2, Art. I, §10, Note 483, p. 185.

IV. POLICE POWER.

The decision of the Supreme Court of the State and the contention of appellees is that the statutory law contained in the Act of March 9, 1933, is justified under the police power of the State and therefore valid.

The answer to this is: "But it is equally well established that the police power, broad as it is, cannot justify the passage of a law or ordinance which runs counter to the limitations of the Federal Constitution".

Buchanan v. Warley, 245 U. S. 59, 74, 62 L.Ed. 149, 160.
6 *R.C.L.*, pp. 191-2, §190; pp. 195-6, §193; pp. 198-9, §§194-5.
6 *R.C.L.*, Permanent Supp., pp. 1647-9.
State v. Moore, 10 S. E. 144, 17 A.S.R. 696, 104 N. C. 714.
6 *R.C.L.*, Cases in Note, p. 192 (9).
Sanders v. Com., 117 Ky. 1, 77 S.W. 358, 111 A.S.R. 219, 1 L.R.A. (N.S.) 932.
6 *R.C.L.*, p. 199, §194, and note §195.
People Ex Rel. Durham v. La Petra, 230 N. Y. 429, 130 N.E. 601, 16 A.L.R. 152, 159, 160, 162, 168, 164 (Op. by Pound, J.).

V. EMERGENCY.

It is also contended that this Act was passed to meet an emergency and the argument is made that for this reason the provisions of the Federal Constitution do not apply.

We respectfully submit that while the Courts are open and functioning there can be no emergency which would set aside the very greatest safeguards of our Federal Constitution. It was written for the very purpose of meeting emergencies.

Ex Parte Milligan, 4 Wall. 2, 121, 18 L.Ed. 290, 295.
Address by Circuit Judge John J. Parker before the American Bar Association, *Amr. Law Journal*, Oct., 1933, and the argument of Judge Black in the Milligan Case.

We commend the language of the Court in the *Milligan case*, to-wit;

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.

No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine can lead directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority.

Respectfully submitted,

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